Supreme Court, U.S.
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No. 00-1214

In the
Supreme Court of the United States

STATE OF ALABAMA,
Petitioner,

v.

LEREED SHELTON,
Respondent.

On Writ of Certiorari
To The Supreme Court of Alabama

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN REPLY TO BRIEF OF AMICUS CURIAE CHARLES FRIED ET. AL.

STEVEN DUKE*
127 Wall Street
New Haven, CT 06511
(203) 432-4959

DAVID M. PORTER
Co-Chair, NACDL Amicus Committee
801 K Street, 10th Floor
Sacramento, CA 95814
(916) 498-5700

THOMAS F. LIOTTI
1001 Franklin Avenue
Suite 300
Garden City, NY 11530
(516) 739-3700

ADRIAAN LANNI
78 Mt. Auburn Street
Cambridge, MA 02138
(617) 495-2485

Attorneys for Amicus Curiae

*Counsel of Record
January, 2002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 10

APPENDIX 1a

TABLE OF AUTHORITIES

Page

Cases

Alabama v. Shelton, 122 S. Ct. 456 (2001) 1 (n.1)
Argersinger v. Hamlin, 407 U.S. 25
(1971) . . . . . 1, 2 ,3, 4 (n. 3), 5, 9
Baldwin v. New York, 399 U.S. 66 (1970) 2
Bell v. Wolfish, 441 U.S. 520 (1979) . . . . . 2 (n. 2)
Blanton v. City of North Las Vegas, 489 U.S. 538 (1989) 2
District of Columbia v. Colts, 282 U.S. 63 (1930) 2
Gideon v. Wainwright, 372 U.S. 335 (1963) 8
Scott v. Illinois, 440 U.S. 367 (1979) 2, 3, 5, 9
United States v. Salerno, 481 U.S. 739 (1987) . . . . 2 (n. 2)
United States v. Smith, 354 A.2d 510 (D.C.C.A. 1976) . . 9

U.S. CONSTITUTION

Sixth Amendment 2, 3

ARGUMENT

I

The Sixth and Fourteenth Amendment Right to the Assistance of Counsel in "All Criminal Prosecutions" Is Not Limited to Prosecutions in Which a Term of Imprisonment Is Imposed and Carried out Immediately upon Conviction.

The Brief of Amicus Curiae by Invitation of the Court of Charles Fried, et al. (hereinafter, "Fried Brief") argues that there is no right to counsel unless the accused is "actually imprisoned at the conclusion of the proceeding" and that "actual incarceration" is a sine qua non of a Sixth and Fourteenth Amendment right to assistance of counsel. Fried Brief at 14.[1] Thus, the brief argues, if any sentence of incarceration is conditioned on future events, it is not a "loss of liberty" within the meaning of Argersinger or a "sentence to a term of imprisonment" within the meaning of Scott because the sentence "does not result in actual incarceration in that proceeding." Fried Brief at 16. This view contradicts common understandings and has perverse implications.

The Sixth and Fourteenth Amendment right to effective assistance of counsel applies in "all criminal prosecutions." Whether it applies in misdemeanor cases depends on whether the prosecution of the misdemeanor is a "criminal prosecution." More than sixty years ago, this Court

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1. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than NACDL, made any monetary contribution to its preparation or submission. See Rule 37.6, Sup. Ct. Rules. The Court has granted NACDL permission to participate in this case as *amicus curiae*. Alabama v. Shelton, 122 S. Ct. 456 (2001).

held that whether a misdemeanor charge is "criminal" depends, among other things, on the moral depravity or gravity of the offense. District of Columbia v. Colts, 282 U.S. 63 (1930). The Court has also said repeatedly that a major gauge of stigma or seriousness is "the penalty actually authorized." Baldwin v. New York, 399 U.S. 66 (1970). The Court clearly implied, in Argersinger v. Hamlin, 407 U.S. 25 (1972), that another indicator of seriousness is the sentence actually imposed. In Argersinger, the Court held that a jail sentence, of any duration, is a sufficient gauge of seriousness to elevate a misdemeanor prosecution to "criminal" status, regardless of other factors.[2] Although its rationale was less than lucid, this Court reiterated that holding in Scott v. Illinois, 440 U.S. 367 (1979). See also, Blanton v. City of North Las Vegas, 489 U.S. 538 (1989).

It would be a sharp and momentous departure from this traditional mode of constitutional analysis for the Court to accept the Fried Brief's suggestion that no prosecution is "criminal" for Sixth Amendment purposes unless it results in a jail sentence imposed and carried out immediately. A jail sentence like that imposed by the trial court below, although never executed, is still an indication of the seriousness of the offense; it colors and characterizes the underlying conduct, and enhances the stigma attached to the offense. Accordingly, the Alabama Supreme Court was correct in equating a suspended jail sentence with a "loss of liberty" within the meaning of Argersinger or a "sentence to a term of imprisonment" within the meaning of Scott.

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2. Incarceration is obviously not by itself sufficient, since incarceration in many contexts is not "punishment." See Bell v. Wolfish, 441 U.S. 520 (1979); United States v. Salerno, 481 U.S. 739 (1987).

To hold that a jail sentence is not a jail sentence until and unless the defendant is locked in a jail cell (or perhaps in chains, on his way to jail) entirely ignores the symbolic function of a jail sentence and disturbs, if not uproots, deep traditional conceptions both of what constitutes a "sentence" and of what constitutes a "criminal prosecution" under the Constitution.

The technical distinction suggested in the Fried Brief appears to be invented for this case. Were a sentence to become a jail sentence only when actually carried out, a jail sentence stayed pending appeal would not be a jail sentence for Sixth Amendment purposes. It is difficult to see what meaningful difference there is between a jail sentence stayed (i.e., suspended) pending appeal and a jail sentence suspended pending probation. If there is a way to justify treating a prosecution leading to the stayed sentence as a criminal prosecution while denying that quality to a prosecution leading to a suspended jail sentence conditioned on probation, it has not been coherently suggested.

The Fried Brief is mistaken when it says that Argersinger is fundamentally different from the present case because Argersinger "had been sentenced to a term of incarceration directly upon his conviction." Fried Brief, at 10. In fact, Argersinger, like Respondent Shelton, received a conditional jail sentence. Argersinger's sentence was 90 days or $500.[3] It would not become an unconditional jail sentence in any arguable sense until and unless Argersinger failed or refused to pay the fine. Argersinger's jail sentence was also stayed pending disposition of his appeal and this Court's

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3. Appendix in Argersinger v. Hamlin, 407 U.S. 25 (1972), at 7.

review.[4] Jail sentences suspended on conditions of probation are not essentially different from jail sentences like Argersinger's that are also conditioned on future events such as the inability or unwillingness to pay a fine or an unsuccessful appeal. To draw the distinction suggested in the Fried Brief would create a danger of an appellate Catch-22 where appellate review of the right to counsel could be thwarted by denying trial counsel and then attaching conditions to the jail sentence imposed after the lawyerless conviction. A defendant could be denied meaningful review of such a deprivation of counsel on the ground his sentence was conditional or provisional. Then, once review was denied, the conditions could be removed and he could be packed off to jail. Suppose, for example, instead of being sentenced to 90 days or $500, Jon Argersinger had been sentenced to 90 days in jail suspended during a probationary period of 30 days (or any other period of time) and a condition of probation was that he pay a $500 fine or "costs."[5] According to Fried's argument, such a sentence would be lawful even though imposed without affording counsel. Furthermore, if Argersinger failed to pay the fine, his probation could be revoked and he could be sent to jail! The Constitutional right recognized in Argersinger could be circumvented by nothing more than the selection of virtually synonymous verbiage.

The Constitutional rights involved here cannot be so flimsy that they can be circumvented by the expedient of delaying imposition of a sentence of incarceration. If a

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4. Id. at 3.

5. Ironically, except for differences in the length of the jail terms, this is very nearly the sentence imposed on Respondent Shelton.

suspended jail sentence can be imposed without counsel, then the suspension revoked and jail imposed, both Argersinger and Scott are rendered impotent and almost meaningless. What State that wished to deny misdemeanants a right to a fair adjudication with assistance of counsel would fail to take advantage of this two-step process of circumvention? What court that cared about the Constitution would want to legitimate such shenanigans? What power would a court have to preclude such circumvention if this Court were to adopt Amicus Fried's argument? The distinction suggested by Fried should be rejected and the invitation to adopt the conceptual distinction between a sentence that is "suspended" and a sentence that is "stayed" should resolutely be resisted. Enormous complications and complexities would be generated by such thin distinctions, injecting confusion into a process that this Court sought to clarify in Argersinger and Scott.

II

Practical Considerations Do Not Support the Claim that States Must Be Entitled to Revoke Conditional Jail Sentences Which Have Been Imposed Without Affording the Right to Assistance of Counsel.

Amicus Fried cites data suggesting that there were more than 8.7 million misdemeanor cases filed in state courts in 1999 (Fried Brief at 18) and that in recent years between 1.4 million to 1.8 million adults were on probation for misdemeanors. Id. at 20. He also cites data suggesting that only a small percentage, perhaps a fraction of one percent, of misdemeanants placed on probation are ever incarcerated for violating probation. Id. at 20-21. From this, he deduces that to require appointment of counsel for indigents "as a condition of imposing a probated or suspended sentence of

incarceration" would impose substantial costs on the states. Id. at 22. To the extent this suggests that these are new costs that the states were not already bearing without complaint prior to the State's petition for certiorari in this case, however, it has no support in the data. No data have been cited by any party that seriously suggest that affirming the decision below will disturb the status quo or general practice anywhere. There is no basis for a belief that any new or additional burdens on the States' finances are at issue in this case.[6]

The data do not remotely support Amicus' implicit argument that considerations of cost support the claim that "the States must be entitled to revoke conditional sentences" (Id. at 18). Although we are inclined to agree with Amicus Fried that "It makes no sense to conclude, as Alabama argues,

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6. The Fried Brief apparently assumes that of the million plus misdemeanor cases annually ending in probation, all involved adjudications of guilt and all involved suspended jail sentences. See Fried Brief at 19-21. It is not clear to us that such was the case. Many of those counted as having received probation may actually have been diverted to probationary programs without having been adjudicated guilty. In such a case, there would not be any constitutional impediment to offering such pretrial diversions to defendants who are not provided counsel. There does not appear to be any basis for estimating how many of those who receive probation under contemporary approaches do so with the assistance of court-supplied counsel nor is there a basis for projecting how many would fall into that category were this Court to hold that no suspended jail sentences can be imposed without affording counsel. In any event, as we argue infra, the states are free to employ diversionary probation without providing counsel, if they insist on doing so.

that a conditional sentence may be imposed but may not be carried out" (Id. at 4), whether the state should be permitted to impose sham jail sentences is a different issue from whether it should be permitted by the Constitution to convict defendants of crime and send them to jail without having afforded them counsel at their trial. None of the parties or the states who have appeared here as amici curiae have espoused the view advanced by Amicus Fried at the invitation of the Court that the states should be permitted to revoke conditional jail sentences imposed without counsel. Nor has anyone, other than Amicus Fried, suggested that considerations of expedience, cost or any other "practical consideration" justify jailing defendants who were convicted without having been afforded counsel. If, as Amicus Fried suggests, only a tiny fraction of the probationary sentences imposed in misdemeanor cases actually end up in incarceration -- perhaps less than a few thousand per year in the entire country -- no legitimate "practical considerations" could warrant permitting those incarcerations without assuring the right to counsel. Very possibly, all or virtually all of those misdemeanants imprisoned following probation revocations in the recent past were provided counsel or supplied their own at both the guilt adjudication stage and the probation revocation stage. If so, no new expenses will be generated by affirming the judgment below. If not, the expenses will still be an insignificant price to pay for what this Court has said are "necessities, not luxuries" and "essential to a fair trial." Gideon v. Wainwright, 372 U.S. 335 (1963).

III

The Decision below Does Not Require Any State to Provide Counsel to Indigents Accused of Misdemeanors Before Imposing Probation, It Merely Precludes Conditional Jail Sentences Without Affording Counsel.

Amicus Fried argues that probation cannot be employed in cases where defendants are not afforded counsel unless the states are free to link probation to a conditional jail sentence. Fried Brief at 7, 22. He is supported in this by the ill-advised concession of Respondent Shelton that "Probation must, of course, carry with it the authority of the granting court to revoke and incarcerate. Without such authority probation would be meaningless and ineffective." Respondent's Brief, at 17, quoted by Fried, at 7. As we show in our Appendix hereto, however, this assumption is erroneous. There is a way, currently employed by many states, to use probation effectively without linking it to the threat of revocation and incarceration. Under these approaches, if probation is unsuccessful, the defendant is simply prosecuted.

At least twenty-three states presently have legislation in place which allows probation to be imposed on minor offenders in lieu of adjudication. Under these schemes, if the defendant violates probation, he is not sentenced, he is merely returned to the criminal process for normal adjudication. This accomplishes the rehabilitative function of probation without the unfairness (and unreliability) of adjudicating guilt without assistance of counsel. Since such probation is the result of agreement and is probably not even "punishment," it can be imposed without the expense of appointing attorneys for every indigent defendant for whom the program is made available. It is in all respects a fairer and more sensible compromise than that suggested by the Fried Brief.

A fuller exposition of existing statutory diversion schemes is annexed hereto in an appendix. It is by no means clear, however, that explicit statutory authorization is even required for the use of probation in lieu of adjudication. Prosecutors are free to work out some informal probationary schemes such as dismissals subject to reinstatement should the defendant violate agreed conditions of behavior. See United States v. Smith, 354 A.2d 510 (D.C.C.A. 1976).

It is clear, therefore, that all states are free under the interpretations of Argersinger and Scott espoused by Respondent and by the court below, to impose probation upon criminal defendants in misdemeanor cases without providing them with counsel. Depriving a defendant of the benefits of a lawyer while determining his guilt or innocence is in no sense a necessary condition of utilizing probationary schemes. There is, therefore, neither a sensible conceptual nor a grounded practical or expedient argument against the decision below.

CONCLUSION

For the foregoing reasons, the judgment of the Alabama Supreme Court should be affirmed.

Respectfully submitted,

STEVEN DUKE
Counsel of Record

THOMAS F. LIOTTI
DAVID M. PORTER
ADRIAAN LANNI
Of Counsel

APPENDIX

Survey of Pretrial Probation Programs

Twenty-three states, but not Alabama, have a form of pretrial probation for minor offenses, generally called Pretrial Intervention ("PTI") or Pretrial Diversion ("PTD"). There are minor variations among states but the general outline of the programs is the same throughout. Both the prosecution and defense must agree to the defendant's enrollment in the program. The defendant waives his right to a speedy trial and the prosecution against him is deferred pending his completion of the program. The defendant must adhere to requirements similar to terms of probation (and in fact in some states it is called probation) for a period of time. If he completes the program, the case against him is dismissed and his record shows no conviction or admission of guilt; if he violates the terms of probation or decides to leave the program, the prosecution against him is resumed. These programs are often limited to first-time offenders, those charged with minor or non-violent offenses, or to offenders whom the court deems not likely to repeat the offense and whose enrollment in a PTI program serves the interests of justice.

Six states, including Alabama, have a PTI or PTD program that applies to only a small class of cases, such as drug offenses or domestic violence. Alabama's program is limited to drug offenders.

I.
States With General PTI or PTD Programs

1. CONNECTICUT: "Accelerated Pre-trial Rehabilitation": Conn. Gen. Stat. § 54-56e.
2. PENNSYLVANIA: "Accelerated Rehabilitation Disposition": Pa. R. Crim. P. 310-320.
3. MISSISSIPPI: "Pretrial Intervention Program (PTI)":

Miss. Code §§ 99-15-101 to 99-15-127.

4. NEW JERSEY: "PTI": N.J. Stat. §§ 2c:43-12 to 2c:43-13.

5. FLORIDA: Fla. Stat. ch. 948.08. There is also a special program for drug offenders. Fla. Stat. ch. 948.16.

6. GEORGIA: "Pretrial diversion program (PTD)": Ga. Code § 15-18-80.

7. OHIO: "PTD": Ohio Rev. Code § 2935.36.

8. SOUTH CAROLINA: "PTI": S.C. Code §§ 17-22-10 to 17-22-170.

9. KANSAS: "PTD": Kan. Crim. Proc. Code §§ 22-2907 to 22-2911.

10. KENTUCKY: "PTD": Ky. R. Crim. P. 8.04.

11. NEBRASKA: "PTD": Neb. Rev. St. §§ 29-3601 to 29-3604.

12. TENNESSEE: "PTD": Tenn. Code § 40-15-105.

13. CALIFORNIA: Cal. Penal Code § 1001.1-9. Also a separate pretrial diversion drug court program for drug offenders. Cal. Penal Code § 1000.5.

14. INDIANA: "PTD": Ind. Code § 33-14-1-7.

15. MASSACHUSETTS: "PTD": Mass. Gen. Laws ch. 276A §§ 1-9.

16. MINNESOTA: "PTD": Minn. St. § 401. 065.

17. MONTANA: "PTD": Mont. Code § 46-16-130.

18. UTAH: "PTD": Utah Code §§ 77-2-5 to 77-2-9.

19. NEW MEXICO: N.M. St. §§ 31-16A-1 to 31-16A-8.

20. VERMONT: Vt. Stat. tit. 3, § 164.

21. WYOMING: Wyo. St. § 7-13-301.

22. OREGON: Or. Rev. St. §§ 135.881 to 135.901.

23. ARIZONA: Ariz. Rev. St. §§ 11-361 to 11-365.

II

States With PTI or PTD Programs in Only a Small Class of Cases

1. ALABAMA: Alabama's Alcohol and Drug Abuse Court Referral and Treatment Program permits drug offenders to enroll in treatment programs in lieu of prosecution, subject to the prosecutor's approval. Ala. Code § 12-23-5.

2. WISCONSIN: Those charged with domestic abuse offenses may enter into deferred prosecution agreements prior to trial. Wisc. Stat. § 971.37.

3. LOUISIANA: Louisiana's pretrial diversion program is limited to those charged with driving while intoxicated. La. Rev. Stat. § 15:578.1.

4. OKLAHOMA: Oklahoma's Restitution and Diversion Program, Okla. Stat. § 991f-1.1, applies only to property crimes, and the requirements of completing the program are limited to payment of restitution rather than the broader range of probation-like requirements used in general PTD programs.

5. COLORADO: In Colorado a program is available for those accused of child abuse or neglect. Colo. Rev. Stat. § 19-3-310.

6. ILLINOIS: Illinois law authorizes each judicial circuit to establish a drug court program which may provide for pre-adjudicatory diversion agreements, whereby the prosecution is suspended pending successful completion of a drug treatment program, as well as a post-adjudicatory treatment program. Ill. Stat. ch. 730 § 166/1 to 35.

7. ARKANSAS: Arkansas law permits judicial districts to establish pre- or post-trial diversion programs for drug treatment. Ark. Code § 16-98-201.